90-864

No.

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1990.

MICHAEL FILLION,
PETITIONER,

*v.*

PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT.

**Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division-First Department.**

JOHN C. MCBRIDE,*
MCBRIDE, WHEELER & WIDEGREN,
240 Commercial Street,
Boston, Massachusetts 02109.
(617) 367-8844

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## Question Presented for Review.

Whether the police properly stopped the petitioner pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1968), and whether subsequent to the stop, the petitioner voluntarily consented to a search of his vehicle during which the police discovered a quantity of cocaine.

## Table of Contents.



## Table of Authorities.

CASES.

CONSTITUTIONAL PROVISIONS AND STATUTES.

No. .

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1990.

MICHAEL FILLION,
PETITIONER,

*v.*

PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT.

**Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division-First Department.**

## Introduction.

The petitioner, Michael Fillion, respectfully requests that this Honorable Court grant a writ of certiorari to review the decision of the New York Supreme Court, Appellate Division, affirming the order and judgment of the New York Supreme Court in and for the County of New York, McLaughlin, J.

**Official and Unofficial Reports of Opinions Issued by The New York Supreme Court and Its Appellate Division.**

*The People of the State of New York* v. *Michael Fillion*, (39525, App. Div. of The S.Ct. held in and for the 1st Dept. in The County of New York, April 19, 1990), *review denied*, (M-2889, August 30, 1990).

*The People of the State of New York* v. *Michael Fillion*, (88/2554, S.Ct., County of New York, Part 74, McLaughlin, J., Decision on motion to suppress, July 20, 1988).

**Jurisdiction.**

This is a state criminal prosecution initiated in the New York Supreme Court by the People of the State of New York in 1988, pursuant to Section 220.21(1) of the penal Law of the State of New York. On July 20, 1988, the trial court, McLaughlin, J., denied petitioner's timely filed motion to suppress evidence. On October 13, 1988, petitioner pleaded guilty to a charge of possession of a controlled substance in the second degree (CPL § 220.18). On December 19, 1989, pursuant to CPL § 450.10, petitioner appealed the trial court's July 20, 1988, order denying his motion to suppress and the court's October 13, 1988, judgment of guilt to the Appellate Division of the New York Supreme Court. The lower court's order and judgment were affirmed by the Appellate Division on April 19, 1990. Pursuant to Part 600, § 600.14 of the Rules of the New York Supreme Court, Appellate Division-First Department and CPL 5513(c) and 5516, on May 29, 1990, petitioner sought leave to appeal the Appellate Division's order affirming the judgment entered by the New York Supreme Court. Leave was denied by the Appellate Division-First Department on August 30, 1990. Now, pursuant to 28 U.S.C.,

§ 1257, petitioner is seeking this Court's review of the Appellate Division's order.

**Constitutional Provisions and Statutes[1] Involved.**

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Statement of the Case.**

On March 23, 1988, the New York Police were conducting surveillance of petitioner and several other Hispanic males in the area near 1st Avenue and 86th Street in Manhattan (A. 25).[2] The police observed petitioner take an opaque duffel bag from one vehicle, put it in a second vehicle and drive the second vehicle north on 1st Avenue (A. 26). While petitioner was stopped at a red light, near the 96th Street entrance to the FDR Drive, the police approached the vehicle from several directions (A. 31). The police identified themselves and ordered petitioner to turn off the ignition and to exit the vehicle (A. 32). The police took petitioner to the rear of the vehicle, searched and questioned him and subsequently searched the vehicle's trunk (A. 35-37). In the trunk, the police discovered the opaque duffel bag (A. 37). Inside the bag, the police discovered twenty-four kilograms of cocaine (A. 4, 30).

---

[1] CPL § 140.50 (text in appendix, A. 23)

[2] For the purposes of this petition, references to the Appendix shall be cited as: (A. ).

On June 27, 1988, the New York Supreme Court, McLaughlin, J., held a hearing on a Motion to Suppress timely filed by petitioner subsequent to being arraigned for possession of a controlled substance (CPL § 220.21). The lower court heard testimony from two witnesses, Investigator Charles Griffo of the New York State Police Department and the petitioner, Mr. Michael Fillion. Based upon the evidence adduced at that hearing, the lower court, on July 20, 1988, entered a seventeen-page order denying the Motion to Suppress. On October 13, 1988, petitioner pleaded guilty to a reduced charge of possession of a controlled substance in the second degree (CPL § 220.18), understanding that his right to appeal the adverse decision of the Motion to Suppress would not be otherwise affected by his guilty plea. Accordingly, the court accepted the plea on that date and continued the matter for sentencing to November 10, 1988.

On that date, the court sentenced petitioner to the minimum mandatory term of eight-and-one-third years to life on the charge, as reduced. In addition, the court also heard and denied a Motion to Reconsider the denial of petitioner's Motion to Suppress.

**Reasons for Granting the Writ of Certiorari.**

In the lower court's order denying petitioner's motion to suppress, the court reasoned that there was an "articulable suspicion to believe that the car [Fillion was operating] contained contraband . . ." *People* v. *Fillion*, Indictment No. 2554/88, Decision on Motion to Suppress, at p. 12 (A. 13). Thus, according to the lower court, the police were justified in approacning petitioner to make inquiry of him. (*Id.*), citing *Terry* v. *Ohio*, 392 U.S. 1 (1968).

Petitioner contends that the lower court's decision was based on its unreasonable finding that Inspector Charles Griffo of

the New York State Police was able to see the outline of a kilogram of cocaine through the bag petitioner had placed in his car. Petitioner contends that if not for the lower court's finding that Griffo saw an outline of a kilogram of cocaine the court could not have determined that Griffo had formed a reasonable suspicion that petitioner's bag contained cocaine.

Further, petitioner contends that the police stop, which was executed at the corner of 1st Avenue and 96th Street was far more than a *Terry* type investigatory stop. It was a custodial interrogation initiated without probable cause and without a warning pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Accordingly, the subsequent search was illegal. It could not have been knowingly voluntary, as determined by the New York Supreme Court.

### A. The Stop was not Based on Probable Cause.

Petitioner's appeal is based in part on the argument that the lower court erred in denying the Motion to Suppress. The absence of facts at the scene which would give a reasonable police officer, in the like circumstances, suspicion to believe that a crime was being committed, or, more importantly, that the appellant was involved in the nefarious activity of possession of a susbstantial amount of drugs in a duffel bag, warrant a conclusion that the actions of the police were not supported by probable cause. See *Draper* v. *United States*, 358 U.S. 307, 79 S.Ct. 329 (1959); *People* v. *Ingle*, 36 N.Y.2d 413 (1975); *Delaware* v. *Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979); *People* v. *Sobotkaer*, 43 N.Y.2d 559 (1978); *People* v. *McRay*, 51 N.Y.2d 594 (1980).

Evidence introduced at the hearing conducted pursuant to the holding in *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), clearly and unequivocally established that the police officer did not have probable cause to believe that petitioner,

innocuously holding an opaque duffel bag, was in possession of a controlled substance at the time the police officer made his observations. See Decision on Motion to Suppress, at pp. 11-12 (A. 12-13). To credit the testimony of Inspector Griffo that he saw the outline of the kilogram packages of cocaine at 1:00 P.M. on March 23, 1988, at 1st Avenue and 86th Street in New York City, a court would have to draw inferences that are not supported by the evidence.

This Court should take note that the duffel bag petitioner carried was the type of bag used by any number of people to transport items of an infinite variety of shapes and sizes (R. 18-19). Thus, the fact that a closed, opaque bag sags or bulges under the weight or shape of its contents does not transform the innocuous possession of such a bag into conduct which provides a reasonable suspicion that the bag contains contraband. *People* v. *Meachem*, 115 A.D.2d 511, 512 (1st Dept. 1985). See *Reid* v. *Georgia*, 448 U.S. 438, 441, 100 S.Ct. 2752 (1980); and *People* v. *Ferguson*, 114 A.D.2d 226 (1st Dept. 1986).

### B. Petitioner did not Voluntarily Consent to the Search.

When a car is lawfully stopped and suspicion is directed at its driver, the de minimus intrusion of ordering the operator out of the car is a mere inconvenience that cannot prevail when balanced against legitimate concerns for the officers' safety. See *Pennsylvania* v. *Mimms*, 434 U.S. 106, 98 S.Ct. 330 (1977); see also, *People* v. *Diaz*, 41 N.Y.2d 876, *cert. denied*, 434 U.S. 939 (1977). Petitioner suggests, contrary to the lower court's conclusion on page 13 of its decision on the Motion to Suppress (A. 13) and the Appellate Division's concurrence, that Inspector Griffo did not act reasonably in ordering petitioner to get out of the car. The problem with applying this principle

to the facts of the instant case is that (1) the car was not lawfully stopped, and (2) no evidence was introduced concerning any legitimate concern for the officers' safety. In fact, the record is devoid of any testimony relative to the police officer having any reasonable concern for his life or safety because of his observations of petitioner.

Assuming, *arguendo*, that the police had formed a reasonable suspicion, the lower court erred when it determined that Griffo's initial stop and questioning of petitioner was proper with respect to New York's "stop and frisk" statute, CPL § 140.50, and *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). The holdings in *Terry, supra*, and its companion case, *Sibron* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968), authorize, under proper circumstances, low level inquiries concerning conduct and pat searches for weapons. *Sibron*, at 65. Griffo did much more than "stop" petitioner. He ordered petitioner to turn his car off and to exit the automobile even though the vehicle was stopped at a red light in traffic with vehicles in front and behind (A. 29). Griffo testified that he, along with two other police officers, Detective Donnelly and Investigator John, "detained" petitioner and were not about to let him go (A. 33). The three officers brought petitioner to the rear of his vehicle and began questioning and searching him.

The lower court should have ruled that Griffo's actions constituted a custodial interrogation and that no *Miranda* warnings had been given to petitioner. Thus, when appraising the totality of the circumstances, the court should not have ruled that petitioner voluntarily "consented" to a search of the trunk. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041 (1973). Specifically, petitioner was not told that he was free to leave. *Florida* v. *Royer*, 460 U.S. 491, 103 S.Ct. 1319 (1983). Further, petitioner was not told that he could refuse to consent to the search. *United States* v. *Fike*, 449 F.2d 191

(5th Cir. 1971). Nor was the petitioner advised of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). *United States* v. *Ballard*, 573 F.2d 913 (5th Cir. 1978). Recently a road-side search was ruled legal because the defendant's vehicle was stopped for violating a motor vehicle statute and, more importantly, the defendant signed a consent form which advised him of his constitutional right to be free from unreasonable searches. See *United States* v. *Bates*, 840 F.2d 858, 860-861 (11th Cir. 1988).

After taking into consideration the totality of circumstances surrounding the stop, no court would be warranted in concluding that it is reasonable for police to stop a vehicle in traffic while waiting for a red light, and then order the operator to exit the vehicle. Such action was not brief or cautionary. Petitioner was being interrogated while in the police custody without appropriate warnings. Petitioner could not have voluntarily consented to a search of his vehicle.

## Conclusion.

For the reasons stated above, this Court should determine that the police did not have probable cause to search the trunk of the vehicle operated by the petitioner, nor did the petitioner knowingly and voluntarily consent to the search. Any consent given by the petitioner was coerced by the police during a custodial interrogation, which was not preceded with warnings

pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Accordingly, the fruits of the search should have been suppressed.

Respectfully submitted,

JOHN C. McBRIDE,*
McBRIDE, WHEELER, & WIDEGREN,
240 Commercial Street,
Boston, Massachusetts 02109.
(617) 367-8844

*Counsel of Record*

## APPENDIX.

### Table of Contents.

## APPENDIX.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on August 30, 1990

Present – Hon. Theodore R. Kupferman Justice Presiding
David Ross
Ernst H. Rosenberger
Richard W. Wallach Justices

The People of the State of New York,
Respondent,

against

M-2889
[39525]

Michael Fillion,
Defendant-Appellant.

Defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on April 19, 1990,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and hereby is denied.

ENTER:

FRANCIS X. GALD
*Clerk*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 19, 1990

Present – Hon. Theodore R. Kupferman Justice Presiding
David Ross
Ernst H. Rosenberger
Richard W. Wallach Justices

The People of the State of New York,
Respondent,

against

Michael Fillion,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment [39525]

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court. New York County (Edward J. McLaughlin, J.), rendered on November 10, 1988, and said appeal having been argued by Thomas Kerner, of counsel for the appellant, and by Carol Antonacci, of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

FRANCIS X. GALD
*Clerk*

Present – Hon. Theodore R. Kupferman Justice Presiding
David Ross
Ernst H. Rosenberger
Richard W. Wallach Justices

The People of the State of New York,
Respondent,

against

Michael Fillion,
Defendant-Appellant.

Judgment, Supreme Court, New York County (Edward McLaughlin, J.), rendered on November 10, 1988, convicting defendant, upon a plea of guilty, of second degree criminal possession of a controlled substance, and sentencing him to a prison term of from 8⅓ years to life, is unanimously affirmed.

Based upon his extensive experience involving several hundred narcotics arrests and his observations of defendant, the arresting officer reasonably suspected that the duffle bag defendant put in the trunk of the car he was driving contained narcotics. The brief and cautionary police action of directing defendant to turn off the car ignition and step out of the vehicle when it was stopped at a red light was reasonable and constitutional under the circumstances (*People* v. *Robinson*, 74 NY2d 773). Further, we agree with the hearing court's conclusion that defendant's consent to the search of the trunk and duffle bag therein was not coerced but was voluntary (*see, People* v. *Gonzales*, 39 NY2d 122; *People* v. *Zimmerman*, 101 AD2d 294). Defendant was not in custody, the investigating officers had not drawn their weapons, and the encounter took place during daylight hours on a Manhattan public street.

*Order filed.*

**Supreme Court of the State of New York**

County of New York — IAS PART 74

The People of the State of New York,
Respondent,

against

Michael Fillion,
Defendant.

Indictment No. 2554/88
Decision on Motion to Suppress

EDWARD J. McLAUGHLIN, J.:

On March 23, 1988, the defendant, Michael Fillion, was arrested at the East Ninety-sixth Street entrance to the Franklin Delano Roosevelt Drive ("FDR Drive") in New York County for possessing about twenty-four kilograms of cocaine seized from inside a duffel bag located in the trunk of a car he was driving. Fillion was charged with criminal possession of a controlled substance in the first degree (Penal Law § 220.21).[1] Defendant's motion for a hearing to suppress the contraband was granted, and the court held a *Mapp* hearing (*Mapp* v. *Ohio*, 367 US 643) on June 27, 1988.

## CREDIBILITY

The witnesses testified at the hearing. Inspector Charles Griffo of the New York State Police appeared as a witness for the People and the defendant appeared for the defense. For the following reasons, the court credits Griffo's testimony as wholly truthful, but rejects Fillion's in its entirety. The issue of credibility is of paramount importance, particularly in determining whether Fillion ultimately consented to the search of the duffel bag, as the People contend and as defendant disputes.

---

[1] In addition, count one of the indictment accuses defendant of criminal sale of a controlled substance in the first degree (Penal Law § 220.43).

The Court carefully watched both witnesses testify. While Griffo answered all questions put to him without hesitation and had the facial gestures and expressions of someone retelling an event through which he lived, Fillion was evasive and dishonest in his mannerisms as well as in the content of his testimony.

First, Fillion, who had been arrested previously in Boston, Massachusetts, for possessing a kilogram of cocaine in a shoe box also located in the trunk of a car he was driving, described his prior encounter with law enforcement as "one minor incident" (transcript at 51). When asked on cross-examination what the problem was about, Fillion said that he "got stopped for speeding." It took fully seven more pointed questions before the defendant finally conceded that the arrest was for possession of narcotics. Without considering whether that prior bad act, which resulted in the Massachusetts court's suppressing the drugs due partly to defendant's lack of consent, should reflect negatively on Fillion's credibility (*but see, e.g., Harris* v. *New York* [401 US 222] in which statements made by a defendant that were suppressed on *Miranda* v. *Arizona* [384 US 436] grounds were admissible to impeach a defendant's credibility when he testified),[2] defendant was so reluctant to give straightforward answers that the court views his entire testimony skeptically.

Second, his repeated insistence, with strained intonations and gestures, that he had no knowledge whatsoever about the contents of the duffel bag in this case had a piercingly hollow ring to it. Fillion, a twenty-year-old high school graduate and gas station manager, appeared "streetwise." He testified that he was directed at about 11:30 A.M. by way of his beeper to go by car — using someone else's automobile — from Wash-

[2] The prior arrest was introduced by the People on the issue of defendant's state of mind regarding the issue of consent; it was not offered on the issue of credibility.

ington Heights to First Avenue and Eighty-sixth Street to meet a "short little" Caucasian man (transcript at 57) whom he did not know, and to take something to the Bronx. Not only was Fillion's expressed justification for having a beeper less than candid, but also his statements that he did not know that anything illegal was in the bag, that he had no interest in the bag, and that he was never told to safeguard the bag were obviously false, since he was observed for at least one half hour, under the most suspicious of circumstances, admittedly arranging for its transfer.

In contrast, Griffo, who unlike Fillion had no apparent motive to lie, was forthright under cross-examination. For example, Griffo mad no attempt to justify the search by using a pretext such as an arrest for violating the Vehicle and Traffic Law (transcript at 29), even though Fillion was going 40-45 miles per hour while driving up First Avenue (transcript at 39).

Moreover, Griffo did not try to rationalize the search by claiming that Fillion was armed, even though he might well have been (see cases cited *infra*) (transcript at 31). The court has often seen law enforcement officers try to justify searches in such a way.

Furthermore, when Griffo was confronted on cross-examination by two relatively minor contradictions between what he testified to and what another officer wrote in a police report, Griffo addressed the contradictions directly without making any attempt to fudge his version or incorporate it into the conflicting testimony.

Griffo also impressed the court by acknowledging that although Fillion was not placed under arrest when ordered from the car, Fillion would not have been free to leave if he had wanted to go. Although that inquiry of Griffo was irrelevant because Fillion never tried to leave, the court took note of Griffo's candor.

Griffo bypassed opportunities to exaggerate what he saw Fillion do. Griffo even left out items helpful to the People's

position, such as the fact that he was watching defendant through binoculars, thus giving him a better view. Griffin also stated that he saw the outline of but one kilogram package, although twenty-four were recovered in the duffel bag. Finally, Griffo testified that he did not tell defendant that he could refuse the search.

Griffo's recitation of the events was never impugned and his testimony was internally consistent. Although defendant argues that Griffo's testimony was undermined by the People's "utter failure to proffer to the court an independent basis" for the police surveillance of the First Avenue transaction (defendant's memorandum at 6), the entire matter was left unexplored by the defense as well. True, the court may wonder why a New York State Police Investigator surveilled a street encounter at First Avenue and Eighty-sixth Street in Manhattan, but the fact remains that he did so. Indeed, even Fillion did not dispute in a material way Griffo's version of the events there.

## THE FACTS

The question of credibility having been decided, the court finds the following facts.

On March 23, 1988, at about 1:00 P.M., Investigator Charles Griffo was conducting surveillance at First Avenue and Eighty-sixth Street.

Griffo, formerly a police officer in Florida and for the past twelve years an officer of the New York State Police, testified that he has made over 200 arrests for narcotics offenses during the course of his career and that, as an investigator assigned to the Troop K Narcotics Unit, he has received special training in narcotics enforcement and detection. Accordingly, what Griffo saw while on the March 23 surveillance to him had all of the hallmarks of a narcotics transaction.

Griffo saw three or four Hispanic males at the intersection, one using a pay telephone and the others speaking among themselves. The individual using the phone was short and pudgy and wore a red jacket. He was repeatedly approached by defendant and one or two of the others. Griffo watched the scene for half an hour while defendant spoke to others who were using the telephone. Fillion stayed within six to eight feet of the telephone. He was nervous, cautiously watching people and accurately identifying unmarked police cars.

Finally, the man in the red jacket motioned to defendant and defendant spoke with him. The man in the red jacket grabbed defendant's arm and pointed to the west corner of First Avenue and Eighty-sixth Street. Defendant then walked to the corner and met one of the individuals, later identified as Herman, who had been at the pay telephone earlier. Together, defendant and Herman walked east across Eighty-sixth Street. Both men kept looking around nervously. They stopped at a parked maroon Chevrolet, from the closed trunk of which Fillion retrieved a green duffel bag. Fillion and Herman quickly separated, and Fillion walked east towards First Avenue.

As Fillion proceeded, he continued to look about the street furtively. He quickened his pace, although straining under the weight of the bulging bag.[3] As Griffo closed in for a closer look at the duffel bag, he was protruding from within it the outline of a "brick-like type figure" (transcript at p. 11) which, from experience, he recognized as the outline of a kilogram of cocaine. The bulge of only one kilogram was visible to Griffo because that one package was stuffed in the duffel bag in a manner different from the other twenty-three packages that Griffo later recovered.

---

[3]One of the kilogram bags was packed so tightly, in fact, that after Griffo inventoried the narcotics he was unable to repackage the cocaine in the duffel bag.

Fillion continued to carry the duffel bag in the "paranoid" manner described previously until he came to a silver Buick Regal parked facing in a northbound direction between East Eighty-sixth and East Eighty-seventh Streets. After looking around yet again, he opened the car's trunk and put the duffel bag inside. He then entered the vehicle and drove rapidly north on First Avenue weaving in and out of traffic at about 1:20 P.M.[4] Griffo followed until Fillion stopped at about 1:30 P.M. for the red light by the Ninety-sixth Street entrance to the FDR Drive.

Griffo exited his unmarked police car and addressed Fillion, the only occupant of the car. Griffo, in plain clothes but displaying his shield, asked Fillion to turn off the ignition and to exit the vehicle. Fillion complied. Griffo patted Fillion's waistband area, which was covered by a wrinkled whitish sweatshirt. Griffo, accompanied by two other officers, New York Police Department Detective Donnelly and New York State Police Investigator John, then walked Fillion away from the door opened to the car's interior to the rear of the car for safety reasons. The car windows were tinted, although Fillion's front window had been rolled down. By the rear, Griffo asked Fillion what he was "doing in the area" (transcript at 16, 31-32), to which Fillion replied "nothing," and Griffo then asked him whether he had any guns or drugs with him.[5] Fillion, who was holding the car keys, told Griffo that it was not his car, that he did not have any contraband, and that Grillo [*sic*] could "look, go right ahead," if he wanted to (transcript at 16, 32-32). Grillo [*sic*] asked whether, in other words, Fillion was sure that it would be "okay" to look inside the car, and Fillion, who was still nervous, said yes and handed him the keys. Griffo, along

[4] Griffo testified that a police report prepared by Special Agent Moran of the Drug Enforcement Administration was in error in stating that Fillion drove away at 12:58 P.M.

[5] A police report stated that Detective Donnelly asked Fillion whether he had any weapons, although Griffo said that Donnelly did not ask that question at that time.

with Senior Investigator Monte, who had arrived just after the keys were handed over, opened the trunk, discovered the cocaine in the duffel bag, and arrested the defendant.

Fillion's account of the incident, which the court discredits, was that an officer other than Griffo directed him at gunpoint to exit the car at the Ninety-sixth Street red light, frisked him, handcuffed him, and moved the car about thirty feet from the intersection. The defendant stated that when the police arrived, all of the car windows were closed, and only rear and front side windows were tinted. An officer other than Griffo took the keys out of the ignition and, without Fillion's permission, opened the trunk. The only matter about which the police spoke to Fillion at that time was to tell him, according to the defendant, that he was a suspect in a Bronx grocery store robbery.

The court believes Griffo's version of what happened at the FDR Drive entrance. Initialy, as the court has previously discussed, Fillion was not a credible witness whereas Griffo appeared entirely truthful. Also, in view of Fillion's tactics when testifying, the court can easily accept a version of events wherein the defendant disassociated himself from the car, the duffel bag, and the drugs when confronted by the officers on March 23, 1988. After all, at the *Mapp* hearing Fillion disclaimed any connection with and interest in the narcotics. That he took a similar posture in the company of the police is not difficult to imagine. What better way, indeed, to assert innocence, even in the face of evidence to the contrary, than to urge the police to search the car. Fillion may well have anticipated the seizure and desired to avoid any suggestion of consciousness of guilt by refusing. Fillion must also have been reminded of how, after the Massachusetts seizure, the police claimed that he consented to a search of the car trunk and that the drugs were suppressed nevertheless. Accordingly, the court adopts Griffo's recitation as the version that makes sense.

## THE LAW

The People offer alternate theories to justify the search and seizure of the narcotics. They contend both that Griffo possessed probable cause when he opened up the car's trunk and seized the duffel bag and urged that Fillion consented to the search. Defendant contests both rationales. The court finds that the police did not have probable cause to search the duffel bag. They did, however, have sufficient and articulated reasons to conduct the inquiry of the defendant that they did and to cause the limited intrusion that resulted. During that inquiry the defendant validly consented to the search that the police conducted. Defendant's motion to suppress is consequently denied.

## PROBABLE CAUSE

There is much merit to the People's argument that Griffo had probable cause to search. Fillion and the man he was with acted in an extremely suspicious manner while at First Avenue and Eighty-sixth Street. The routine at the pay phone, the pointing, the nervous glances up and down the street and at the unmarked police cars throughout the entire incident, the retrieval of the heavy duffel bag, and the speeding away up First Avenue, when combined with the bulge in the duffel bag that defendant was carrying, together have a clear meaning to a professional, supervising police officer trained in apprehending drug sellers and users. Griffo believed that Fillion was either a courier of narcotics or that he had just purchased a sizeable quantity of cocaine. The question is whether that reasonably held belief amounted to probable cause.

The People based their argument that Griffo had probable cause on *People* v. *McRay* (51 NY2d 594). There, the transfer of the glassine envelopes, with furtive gestures, in an area noted for narcotics activity more than amply established probable cause. Depending on what happened and on who made the

observations, *McRay* held that even less information may be tantamount to probable cause. But how much less? Here, Griffo testified that the locales in question were not specifically high crime areas or places where Fillion's presence would cause suspicion. Also, as defendant urges, while there was an exchange of a container, at least from one car to another, a duffel bag has none of the tell-tale or hallmark signs of cocaine possession that a glassine envelope has for heroin. This is true despite the outline of a kilogram in the bag and despite the fact that, according to Griffo, cocaine traffickers transport their contraband in bags similar to the non-military duffel bag that Fillion was carrying.

The problem with the People's analysis, since the court agrees that probable cause under the *McRay* progeny exists when a container of whatever kind more probably holds illicit narcotics rather than innocuous substances (*see, People* v. *Greenridge*, 131 AD2d 303, 304; *People* v. *Eldridge*, 103 AD2d 470, 474), is that seeing an opaque envelope, or a duffel bag, does not constitute probable cause.

The case of *People* v. *McNatt* (107 AD2d 1) cited by the People was reversed by the Court of Appeals (65 NY2d 1046). Additionally, the First Department in *McNatt* held, in an aspect of the case that was not reversed, that white envelopes, even in an area known for narcotics activity, amounts only to reasonable suspicion (107 AD2d at 4).

The defendant contends that "the initial stop of his motor vehicle was unjustified and illegal" (defendant's memorandum at 10; see also 6 and 7). Although there was a degree of intrusion into defendant's liberty by ordering him to get out of the car, by frisking his waistband, by walking him to the rear of the car, and by asking him questions, the uncontradicted testimony of both Griffo and Fillion was that the defendant was approached as he was already stopped at a traffic light. Either way, "the degree of suspicion required to justify the stop [of a

car] is minimal. Nothing like probable cause . . . is required" (*People* v. *Ingle*, 36 NY2d 413, 415). Therefore, although probable cause was absent, an articulable suspicion to believe that the car contained contraband was present.

Despite the absence of probable cause, all of the factors known to Griffo were more than sufficient to create a credibly articulated reasonable suspicion that defendant was committing the crime of possession of cocaine. The police therefore were justified in approaching the defendant to make inquiry of him (CPL 140.50, subd 1; *Terry* v. *Ohio*, 392 US 1).

The right of the police to ask questions and request information while discharging law enforcement duties hinges on the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter (*People* v. *De Bour*, 40 NY2d 210, 219). In this case, the encounter was devoid of harassment, non-degrading, focused on a serious crime, and justified by defendant's prior conduct and the fact that he was at the entrance to a highway from which he could have escaped apprehension or further investigation.

Griffo acted reasonably in ordering Fillion to get out of the car without further inquiry. When a car is lawfully stopped and suspicion is directed at its driver, the *de minumus* intrusion of ordering the operator out of the car is a "mere inconvenience [that] cannot prevail when balanced against legitimate concerns for the officer's safety" (*Pennsylvania* v. *Mimms*, 434 US 106, 111; *see also, People* v. *Diaz*, 41 NY2d 876, *cert. denied* 434 US 939).

After Fillion exited the car, his waist area was frisked. That, too, was permissible, because the level of police activity was a measured response to the level of suspicion (*People* v. *Chestnut*, 51 NY2d 14; *cert. denied* 449 US 1018). Even if only the rear and front side windows were tinted, as defendant testified, Fillion might still have hidden a weapon. He could

have had a weapon under his wrinkled sweatshirt. Weapons and narcotics go hand in hand, and courts may take judicial notice that persons engaged in narcotic crimes in New York, at least those above the level of street corner sellers, are frequently armed (*People* v. *Hines*, 102 AD2d 713). When large quantities of drugs are involved, the police can reasonably expect weaponry (*People* v. *Castro*, 80 AD2d 535). Drug traffickers also often commit crimes of violence against law enforcement officers (*People* v. *Broadie*, 37 NY2d 100, 112), not just against other drug dealers.

"Confronted by the reality of the persuasiveness of drug dealing and handguns" (*People* v. *Stone*, 86 AD2d 347, 349), the action of frisking only the waist area and no other part of defendant was a "minimally intrusive course" (*id.* at 349).

Finally, the police were authorized to ask questions of the defendant as he was standing near his vehicle (*see, People* v. *Dread*, 49 AD2d 401, 403). The investigative effort to ascertain whether defendant had any drugs or guns in his car was authorized by Griffo's "reasonable suspicion which is lower (less stringent) than the standard of probable cause for arrest" (*id.* at 403). As the Court of Appeals held in *People* v. *Moore* (32 NY2d 67, 69), "[t]he touchstone under the statute as well as under the Federal Constitution is reasonableness."

Griffo's conduct in approaching and questioning Fillion was eminently fair and reasonable. The answer to his inquiry provided him not with probable cause, but with Fillion's consent to search.

CONSENT

The court has already determined that Fillion told Griffo twice that it was "okay" for him to search the car. In fact, Fillion even gave Griffo the keys to the car, thus evincing a broad consent to a search that included the trunk (*see, People* v. *De Pace*, 127 AD2d 847, 849; *People* v. *Aponte*, 124 AD2d

489; and *People* v. *Abrams*, 95 AD2d 155, 158-159). This does not, however, close the examination.

The People possess a heavy burden to establish consent by "clear and positive" (that is, clear and convincing) evidence (*People* v. *Zimmerman*, 101 AD2d 294, 295). Consent to search must be free, knowing, and voluntary; acquiesence to a claim of lawful authority does not constitute consent (*People* v. *Gonzalez*, 115 AD2d 73, aff'd 68 NY2d 950).

The Court of Appeals in *People* v. *Gonzalez* (39 NY2d 122) set forth four factors to assist courts in determining the voluntariness of consent.

The first factor is "whether the consentor is in custody or under arrest, and the circumstances surrounding the custody or arrest" (*id.* at 129). Here Fillion was neither in custody nor under arrest, even though Griffo would have prevented an effort to leave. Griffo's mental state was not communicated to Fillion. Since Griffo did not convey the fact that defendant could not leave, defendant was not under arrest (*People* v. *Yukl*, 25 NY2d 585, *cert. denied* 400 US 851). The interruption of the defendant's liberty of movement also was not to significant that his consent was a mere capitulation to authority (*People* v. *Springer*, 92 AD2d 209, 213-214).

The second factor deals with "the background of the consentor" (39 NY2d at 129). At the time of his arrest, Fillion was a twenty-year-old high school graduate and the manager of a gas station. As such, he possessed the education of the average New Yorker and a position many would envy. He also had a serious prior contact with the police in another state and had benefited from a suppression hearing dealing with some of the very issues that confronted him on March 23, 1988. Also, he knew, among other things, how to use a beeper, how to discover unmarked police cars, and how to disassociated himself from the car, the duffel bag, and the narcotics. Finally, in considering background, someone trusted Fillion to transport

successfully twenty four items, each of which, the court takes judicial notice, is valued at about $22,000.

The third factor concerns the extent to which the consentor cooperated with law enforcement officials (*id.* at 129). At the 96th Street entrance, Fillion was so cooperative that he even gave Griffo his car keys.

The fourth and final factor is "whether a defendant was advised of his right to refuse to consent" (*id.* at 130). Fillion was never so advised, although that criterion is not determinative (*People* v. *Zimmerman, supra*, p. 296). In any event, Fillion was asked by Griffo whether he really consented immediately after Fillion had already expressed his explicit consent. Since Fillion actively desired to convey his cooperation, there was little need to advise him that he did not have to consent.

In short, as the People contend, Fillion's consent was based on calculation, not on yielding to overbearing police pressure. As such, the police validly obtained Fillion's permission to search the trunk of the car and the duffelbag.

For the foregoing reasons, defendant's motion to suppress is denied.

The above constitutes the order, opinion and decision of the court.

Dated: July, 20, 1988 /s/ _____
J.S.C.

**State of New York**
**Supreme Court**

**County of New York**
**Part 74**

The People of the State of New York

against

Indictment No.
2554/88

Michael Fillion

NOTICE OF APPEAL

Now comes the defendant, Michael Fillion, and gives notice that he is exercising his right to appeal the Court's denial of his Motion to Suppress.

Respectfully submitted,

MICHAEL FILLION
By his attorney,

JOHN C. McBRIDE
McBRIDE, WHEELER & WIDEGREN
240 Commercial Street
Boston, Massachusetts 02109
(617) 367-8844

CERTIFICATE OF SERVICE

Now comes John C. McBride and attests that a copy of the defendant's Notice of Appeal has been forwarded by mail to: Terrence M. Kelley, Assistant Deputy Attorney General, Organized Crime/Task Force, Empire State Plaza, Agency Building, 1, 9th Floor, Albany, New York 12223

JOHN C. McBRIDE

**State of New York**
**Supreme Court**

**County of New York**
**Special Narcotics Part**

The People of the State of New York,

– against –

Indictment No.

HERMAN GONZALEZ, MICHAEL FILLION
and ALBERTO CASTRO-RESTREPO

COUNT I

The Grand Jury of the Special Narcotics Courts, by this indictment, accuses the defendant, HERMAN GONZALEZ, of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, in violation of Section 220.43(1) of the Penal Law of the State of New York, committed in New York County as follows:

On or about March 23, 1988, the defendant knowingly and unlawfully sold to Michael Fillion one or more preparations, compounds, mixtures and substances of an aggregate weight of more than two ounces containing a narcotic drug, to wit: cocaine.

COUNT II

The Grand Jury of the Special Narcotics Courts, by this indictment, accuses the defendants, MICHAEL FILLION and HERMAN GONZALEZ, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, in violation of Section 220.21(1) of the Penal Law of the State of New York, committed in New York County as follows:

On or about March 23, 1988, the defendants knowingly and unlawfully possessed one or more preparations, compounds, mix-

tures and substances of an aggregate weight of more than four ounces containing a narcotic drug, to wit: cocaine.

COUNT III

The Grand Jury of the Special Narcotics Courts, by this indictment, accuses the defendants, HERMAN GONZALEZ and ALBERTO CASTRO-RESTREPO, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, in violation of Section 220.21(1) of the Penal Law of the State of New York, committed in New York County as follows:

On or about March 24, 1988, the defendants knowingly and unlawfully possessed one or more preparations, compounds, mixtures and substances of an aggregate weight of more than four ounces containing a narcotic drug, to wit: cocaine.

_____

STERLING JOHNSON, JR.
Special Assistant District Attorney

A TRUE BILL

_____

Foreman

**State of New York** **County of New York**
**Supreme Court** **Part 74**

The People of the State of New York,

– against – Indictment No.

MICHAEL FILLION

MOTION TO SUPPRESS EVIDENCE
ILLEGALLY SEIZED

Now comes Michael Fillion, defendant in the above-entitled case and respectfully moves this Honorable Court to allow his motion to suppress all evidence seized from his person and automobile on or about March 23, 1988 by members of the New York City Police Department. Specifically, the defendant moves that the court enter an order suppressing approximately twenty-four kilograms of cocaine seized by the police from a closed, opaque duffel bag located in the locked trunk of his automobile during a warrantless, nonconsensual search and seizure.

In support of his motion, the defendant alleges that the initial stop of his motor vehicle, seizure of his person, and search of his automobile were conducted in violation of the Fourth Amendment to the United States Constitution and the Constitution of the State of New York as the initial stop was made without a warrant, probable cause, or reasonable suspicion for even a limited intrusion; the warrantless search and seizure was conducted without probable cause and exigent circumstances or free and voluntary consent.

STANDING

The defendant, Michael Fillion, respectfully alleges that as driver, sole occupant, rightful possessor, and custodian of the

keys to the seized and searched automobile he retains a legitimate expectation of privacy in the automobile and all its compartments and has standing to assert the present motion to suppress. *People* v. *Millan*, 69 N.Y.2d 514, 508 N.E.2d 903 (1987).

FACTUAL BASIS OF MOTION TO SUPPRESS

In support of his motion to suppress, defendant Michael Fillion, through undersigned counsel, alleges facts as contained in the attached affidavit.

Defendant respectfully requests that the court grant him a hearing on the present motion to determine the admissibility of any physical evidence allegedly seized from the physical or constructive possession of the Defendant.

Respectfully submitted,

MICHAEL FILLION
By his attorney;

JOHN C. McBRIDE
McBRIDE, WHEELER & WIDEGREN
240 Commercial Street
Boston, Massachusetts 02109
(617) 367-8844

**State of New York**
**Supreme Court**

**County of New York**
**Part 74**

The People of the State of New York,

– against –

Indictment No.
2554/88

MICHAEL FILLION

DEFENDANT'S MOTION FOR COURT TO RECONSIDER DECISION ON MOTION TO SUPPRESS IN LIGHT OF RECENTLY OBTAINED GRAND JURY TESTIMONY BY STATE'S CHIEF WITNESS

Now comes the defendant, Michael Fillion, and moves that this Honorable Court reconsider its decision to deny the defendant's motion to suppress. In support of his motion, the defendant contends that recently acquired transcripts indicate that the State's chief witness is not credible. Specifically, the witness' testimony at the motion to suppress hearing directly contradicts his prior testimony before a New York County Grand Jury.

Respectfully submitted,
MICHAEL FILLION
By his attorney;

JOHN C. McBRIDE
McBRIDE, WHEELER & WIDEGREN
240 Commercial Street
Boston, Massachusetts 02109
(617) 367-8844

## CRIMINAL PROCEDURE LAW

**C.P.L. § 140.50. Temporary questioning of persons in public places; search for weapons.**

1. In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

2. Any person who is peace officer and who provides security services for any court of the unified court system may stop a person in or about the courthouse to which he is assigned when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

3. When upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

**Supreme Court**
**Trial Term**

**New York County**
**Part 74**

The People of the State of New York,

– against –

MICHAEL FILLION
Defendant

INDICTMENT NO:
2554/88

CHARGE:
CPCS 1

Hearing

BEFORE:

HONORABLE EDWARD McLAUGHLIN,
JUSTICE OF THE SUPREME COURT

APPEARANCES:

For the People:

STERLINE JOHNSON, ESQ.,
Special Narcotics Prosecutor

BY: TERRANCE KELLY, ESQ.
Assistant District Attorney

For the Defendant:

JOHN McBRIDE, ESQ.,
240 Commercial Street
Boston, Massachusetts

[6]

Q Now, as part of these duties during the past two years, have you been involved in numerous surveillances of people under investigation for the possession and sale of cocaine?

A Yes.

Q Now, Investigator Griffo, I want to turn your attention to March 23, 1988. I ask you what you were doing in your capacity as a New York State Police investigator at approximately one p.m. on that date?

A I was involved in a surveillance in the vicinity of East 86th Street and First Avenue in New York City.

Q And that's in Manhattan, New York County?

A Yes.

Q And could you tell the Court what, if anything, you observed at this time?

A Yes. I observed three to four Hispanic males in the vicinity of the corner of East 86th Street and First Avenue. One of those Hispanic males was utilizing a pay phone at that location, and the other males were engaged in conversation.

Q For the benefit of the record and the Court, is there some way you can identify the male that you observed using the telephone, by clothing or —

A I recall him to have had a red jacket and he was

[10]

Chevrolet. They both were standing by the trunk of that vehicle. They both continued to look about the street. I observed the trunk of the vehicle go up, and I observed Michael Fillion remove a green-colored duffel bag from the trunk of that vehicle. The trunk was closed.

Michael quickly separated from the other individual he was with, and began walking back towards First Avenue on East 86th Street. He was now walking in an easterly direction. I continued to observe Michael.

He still appeared nervous and he was still looking about, and he was now walking much quicker and with noticeable effort, since my observations of the bag were that it was very heavy, and the contents of it — it was packed so tight that the contents of it were bulging. I was able to notice that. Also, he was leaning a bit to the left. He had the shoulder strap of the duffel bag over his left shoulder.

I pulled away from my location, which was on East 86th Street between First and Second Avenues, and continued to maintain a visual observation of Michael as he walked with this package.

During this time, I had the opportunity to get a close look at the package he was carrying; and I've had experience during my career in narcotics getting involved in situations [11] where people would be moving contraband in packages similar to the one that Michael was carrying, and I did notice as I got closer what appeared to be the outline of a kilo of cocaine.

MR. McBRIDE: Objection, motion to strike.

THE COURT: Overruled. What does that mean?

THE WITNESS: It was a brick-like type figure, which is usually one of the ways I've seen, in my experience, a kilo of cocaine to be packed. Like I had said earlier, the

package was packed so tight that the contents were bulging from it, and a portion of that contents which I had observed was the outline of what I have seen many times to be a kilo of cocaine — would appear to be what that appeared to be.

Additionally, the behavior displayed by the defendant and his associates on the street, from my experience once again, not only in narcotics but over my years as a police officer in criminal behavior, the manner in which they acted indicated to me that there was a transfer of narcotics —

MR. McBRIDE: Objection, motion to strike, Judge.

THE COURT: It's all related to what he says **[12]** was the basis for whatever it was which occurred next. Overruled. He can explain to me why he's doing what he's doing, and then I will have to assess what significance the law says we draw from what he says.

Q Investigator Griffo, had you ever seen a kilo of cocaine in this particular shape before?

A Yes, yes.

Q And at that time, when you saw it in that shape, could could you tell us what it was packed in, what type of container?

THE COURT: In his earlier observations, unrelated to this one?

MR. KELLY: Yes, your Honor.

THE COURT: Under what circumstances have you seen kilograms of cocaine, is the question.

THE WITNESS: Well, in my enforcement term, during the two years in narcotics, I've dealt with mid to upper level drug dealers; and most of the time, they package a kilogram of cocaine in this manner, same size, same shape, and on closer observation, it would usually be bound tightly in plastic and taped with brown tape.

Q Now, did you only observe one kilogram or what [13] appeared to be a kilogram in this duffel bag?

A Yes, but like I had said earlier, the package was tightly packed, and as I go on, I will explain to you that, after I recovered that package, what had happened whas that, however it was packed or whoever packed it, one kilo was actually stuffed in in a manner different from the others, which produced that outline of the kilo.

Q Was the rest of the bag smooth?

A No, no. It still had bulging in it from the ends of the kilos which were stacked inside of it. What had happened is, later on after I retrieved the package and went through the evidence, I myself was unable to put the cocaine back in that package. I had difficulty in putting it back.

Q After you made this observation as to the bag, what did you do next, Investigator Griffo?

A I continued to watch the defendant. I drove my motor vehicle to the intersection of East 86th Street and First Avenue. The defendant arrived at that location and made a left-hand turn on First Avenue, now walking on First Avenue in the direction of East 87th Street. He still displayed the behavior that I described earlier.

Q And what's that?

A He was walking fast, appeared very paranoid. He was looking around him on the street. He was leaning to one [14] side as he held the package over his left shoulder.

He approached a vehicle which was parked. It was a silver Buick. That vehicle was parked on First Avenue between East 86th and East 87th, facing in a northbound direction.

He went to the trunk of that vehicle, looked around quickly, checked the area, and opened the trunk and put the package inside the trunk of the silver Buick. He closed the trunk, went

over the driver's side, entered the vehicle, started it, and after a few minutes — he was having difficulty getting out of his parking spot — he pulled away and proceeded northbound on First Avenue.

I had made the left-hand turn, still keeping the defendant under observation. I continued to surveil the vehicle as it pulled away northbound and followed it. It proceeded at a rapid speed. He was going in and out of traffic trying to get around other vehicles. He appeared to be in a rush.

I followed the vehicle to the intersection of East 96th Street where it made a right-hand turn; and as it approached the entrance to the FDR Drive, it had stopped at a red light with other traffic at that location.

Q Now, what happened after Michael Fillion's vehicle came to a stop at East 96th Street and the Eastside Drive?

**[15]** A I approached — I stopped my vehicle in traffic.

Q You did not stop Mr. Fillion?

A No, he had already been stopped.

Q By traffic?

A By trarffic.

MR. McBRIDE: By the regular course of traffic?

THE WITNESS: Yes, it was a red light at that intersection.

Q Were there vehicles between him and the red light?

A Yes, there were several vehicles between him and the red light.

Q Were they police vehicles or just vehicles?

A Normal vehicles.

THE COURT: Were the people who wash the windshields there, too?

THE WITNESS: No, they were not.

THE COURT: All right.

Q Would you tell the Court what happened after you got out of your vehicle?

A I approached the driver's side of the vehicle that Michael Fillion was driving. I asked the only occupant, who was the driver, Michael Fillion, to shut his vehicle off and come out of the car.

**[16]** He — I did at that point display my shield and identify himself as a police officer. He did exit his vehicle. I walked him to the rear of the vehicle, and I asked him what he was doing in the area, and he said nothing.

I further asked him if he had any guns or drugs with him, and he responded that he did not, if you'd like to look, go right ahead, or something to that effect, which I had recorded in a report with the District Attorney.

Q Did you ask him who owned the car?

A Prior to my asking him that, he responded in the dialogue that I just repeated, it's nor my car. If you'd like to, go ahead and look.

I said to him, in other words, it's all right if I look in your vehicle, and he said yes. He handed me the keys, and at this point, other members of my surveillance, other police officers had arrived at the scene, and I went to the rear of the silver Buick with another police officer.

Q And who was that?

A Senior Investigator Mante. We opened the trunk of the vehicle, and inside was the green duffel bag which I had observed earlier and the contents of that were numerous kilos of cocaine.

Q Now, when you first asked Mr. Fillion to get out of

[24]

your memory?

A It's ten blocks.

THE COURT: Half a mile.

Q. It's about half a mile?

A. That's correct.

Q And when you approached the defendant, he was seated in the front seat of his car, and you were dressed in plain clothes, correct?

A Yes.

Q And when you actually came up to the driver's side door and identified yourself as a New York City or New York State detective, was anyone with you from law enforcement at that point in time?

A The other officer was Detective Donnelly.

Q Donnelly?

A Yes.

Q Where was he?

A He was approaching the vehicle from the front? I was approaching the vehicle from the rear.

Q Now, was the vehicle in the middle of the street, stopped in back of a car or in front of a car in traffic?

A There is two or three lanes at that location that we're talking about in that one direction to get on to the FDR Drive.

[25] Q Right.

A. The position of his vehicle was the closest lane to the median. There is a cement median right there. There were several vehicles in front of him, not police vehicles, just normal people on the street, and vehicles behind him, all stopped at a light.

Q And if the light turned green without your having stopped him, he would have naturally gone on to the FDR Drive, assuming the light turned green before you reached him?

A Yes, it looked that way.

Q And when you approached him, what was the very first thing you said?

A I immediately identified myself as a police officer. I said, police. The vehicle he was driving had dark, tinted windows. It was difficult for me to see in as I was approaching it from the rear, so I did approach cautiously.

Q Were all the windows dark and tinted, that is, the rear windows and the side windows?

A The rear and the side windows.

Q Was his driver's side window down when you approached?

A Yes, it was.

**[26]** Q And was the passenger's side window down when Inspector or Investigator Donnelly approached?

A He didn't approach from the passenger's side, Counselor. He approached from the front of the vehicle, and came around towards the driver's side.

Q And besides that investigator, was anybody else present at that time when the initial approach was made?

A Investigator John was approaching. I don't know where he came from.

Q Now, after you identified yourself as a police officer, what happened next?

A Well, after identifying myself and reassuring myself that it was safe, I asked Michael Fillion to turn his car off and come on out of the vehicle.

Q Was he still parked in the same area?

A Yes, he was stopped in traffic.

Q Did he shut the ignition off.

A Yes, he did.

Q What was done with the keys to the ignition?

A He held them.

Q When you say "he held them," did they remain in the ignition or did he take them out and hold them physically in his hand?

A He had them in his hand.

**[27]** Q You ordered him out of the car; is that correct?

A Yes.

Q For what purpose did you order him out of the car?

A To question him.

Q To question him in connection with what?

A With the activities that I had just seen.

Q Did you consider him to be under arrest at the time you ordered him out of the car?

A No.

Q If he had told you no, he wouldn't get out of the car, would you have let him go?

A No.

Q Did you consider him as being detained at that time?

A Yes.

Q What was the difference between detention and arrest and custody in your mind at the time under those circumstances?

A Well, to put him in custody would be to deprive him totally of his freedom, to put him under arrest and to handcuff him.

Q If he told you he wasn't going to get out of the car, tell you his name and address and give you a license and registration, would you have let him go?

**[28]** A That's not why I stopped him, to ask him —

Q Would you have let him go, sir? That's the question.

A No, I would not.

Q Did you ask him for a license and registration or any type of information relative to identification?

A At that point, I did not.

Q At any time, while you or any law enforcement officers were present at the scene, did anybody ask him for any type of identification?

A Yes.

Q Who did?

A I don't know.

Q Did he produce anything to satisfy anyone with respect to his identification and lawful operation of the vehicle?

A I don't know.

Q Were you satisfied that he was in lawful custody of the vehicle?

A Excuse me?

Q Were you satisfied that he was in lawful custody of the vehicle at that point in time?

A At the initial stop?

Q Yes.

**[29]** A No.

Q Okay. And earlier, you mentioned to the Court that he appeared to be driving hastily or speedily as he was traveling from East 86th Street to East 96th Street; is that correct?

A Yes.

Q How fast was he going?

A I described it as someone in a rush, weaving in and out of traffic.

Q Like 99 percent of the cab drivers in the city?

A Changing lanes —

Q Like 99 percent of the car drivers in this city?

A I've seen them do that.

Q Did you see what he did in connection with the operation of the motor vehicle to be an arrestable offense?

A No.

Q Now, once he was out of the car, who actually took him to the rear of the vehicle, in the trunk area?

A I did.

Q For what purpose?

A It has been my practice over the year as a police officer, just an instinctive thing, wherever I talk to someone out of their vehicle, I leave the compartment area, the occupant compartment area. I am usually used to having **[30]** several people in a vehicle, and for my own safety —

Q So your response is, for your own safety and based on custom and practice that you employed, you decided to take him to the rear; is that correct?

A Yes.

Q Was there general bedlam at this time, horns beeping and people yelling and screaming because of the congestion?

A The light was still red.

Q And for how long did the light remain red?

A I don't know, but as we were there, it did turn green.

Q And the other two officers who were with you, where were they when you brought Fillion to the trunk, the rear part of the vehicle?

A They were standing by in that area, by the vehicle.

Q How was he dressed at this time, by the way?

A He had a white sweatshirt on.

Q A white sweatshirt?

A A white-ish color sweatshirt.

Q Were you satisfied that he was not armed or otherwise dangerous —

A Well, I did — the white sweatshirt was pulled **[31]** over his waistband, wrinkled up. I did pat down his waist.

Q When did you pat down his waist?

A While in conversation with him outside the car.

Q All right. So what you did was to take him out of the car, talk to him briefly; and is it your testimony that you conducted a pat first of the outer garments?

A Just the waistband. That's what I was concerned about, yes.

Q Did you feel his legs, thighs, knees?

A There was no reason to, not at that point.

Q After you conducted that brief pat down frisk, you were satisfied that he wasn't armed and didn't present a threat to you or your brother officers; is that correct?

A Yes.

Q And then, exactly what happened?

A As I said earlier, we had the conversation and I asked him what he was doing.

Q That was the very next thing that you said, what are you doing?

A Yes.

Q And what was his response to your question, what are you doing?

A I said, what are you doing in this area? He said, nothing.

**[32]** Q Was that an area that was out of character for a person like him to be in?

A No.

Q And he said nothing in response to your query; is that correct?

A Yes.

Q And after he said "nothing," what was your next question?

A I asked him if he had any guns or drugs on him or in the vehicle.

Q And what was his reply?

A He said, no, go ahead and look if you want to.

Q Out of the clear blue, without your even making a request to search the car, it's your testimony that he said, no, go ahead and look if you want to?

A Yes. The defendant was extremely nervous, Counselor.

Q All right. Now, aside from being extremely nervous, did he say or do anything else at that particular time in response to your question?

A He had said to me, it is not my car.

Q Aside from stating that, did he say or do anything else?

A I had asked him, in other words, then in other **[33]** words, it's okay to look in your car, and he said yes.

Q And when he said yes, what did you do next?

A I checked the trunk of the car.

Q Where were the keys to the trunk of the car?

A He handed them to me.

Q He handed you the keys?

A Yes.

Q And after he handed you the keys and you opened the trunk of the car and saw the green duffel bag, you searched it and seized its contents; is that it?

A Myself and Senior Investigator Mante, yes.

Q Now, this particular incident, that is, the questioning, the stop and the search took place at about 1:30 p.m.; is that correct?

A Yes.

Q And is it you or was it someone else who asked him the question relative to having any weapons?

A I asked him.

Q You asked him?

A Yes.

Q Well, again, you've read the D.E.A. 6, paragraph nine, have you not?